IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.07.2007

CORAM :

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN

AND

THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Tax Case (Appeal) Nos.1001 and 1002 of 2007

Commissioner of Income-tax,
Chennai. ..Appellant in both the T.C.(A)s.

Vs.

M/s.T.M.Abdul Azeez & Co.,
No.17, Anderson Street,
Chennai-600 001. ..Respondent in both the T.C.(A)s.

Appeals under Section 260A of the Income-tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai Bench 'B', Chennai in I.T.A. Nos.1527 and 1528/Mds/2006 dated 28.09.2006 for the assessment years 1997-98 and 1998-99. against the ITA NO. 410 and 411/2005-06 dated 4/5/2006 on the file of the Commissioner of Income Tax (Appeals - IX) Chennai 34 agaisnt PAN AAAFJ/3342G dated 30.09.2005 on the file of the Income Tax Officer, Ward 1X (3) Chennai for the Assessment year 1997-98 and 1998-99.

For Appellant in both : Mr.J.Naresh Kumar,
Standing Counsel for
Income-tax Department

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JUDGMENT

(Judgment of the Court was delivered by
P.P.S.Janarthana Raja, J.)

These appeals are filed under Section 260A of the Income Tax Act, 1961 by the Revenue, against the order of the Income Tax Appellate Tribunal, Chennai Bench 'B', Chennai in I.T.A. Nos.1527 and 1528/Mds/2006 dated 28.09.2006, raising the following common substantial question of law:-

"Whether in the facts and circumstances of the

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case, the Tribunal was right in holding that the concealment of income was not proved for the purpose of levying penalty u/s 271(1)(c), when the assessee himself could not prove the same and offered it for assessment only subsequent to the issuance of notice u/s 148?"

2. The facts leading to the above substantial question of law are as under:-

The relevant assessment years are 1997-98 and 1998-99 and the corresponding accounting years ended on 31.03.1997 and 31.03.1998, respectively. For the assessment year 1997-98, the assessee filed Return of income on 24.10.1997 admitting a total income of Rs.89,963/-. Later, notice under Section 148 of the Income-tax Act ("Act" in short) was issued to the assessee on 16.03.2004. In response to the notice, the assessee filed Return of income on 18.03.2004 admitting a total income of Rs.2,71,960/- which included additional income offered amounting to Rs.1,82,000/- being the loan credits in the names of ten persons. The assessment was completed The Assessing Officer completed the assessment on 29.03.2006 on a total income of Rs.2,72,160/-. In the course of assessment proceedings, notice under Section 271(1)(c) of the Act was issued to the assessee. The assessee filed a reply on 19.09.2005 stating that it has offered a sum of Rs.1,82,000/- and paid the tax and requesting not to levy penalty under Section 271(1)(c). The Assessing Officer rejected the contention and levied a penalty of Rs.72,800/-. For the assessment year 1998-99, the assessee filed Return of income on 28.10.1998 admitting a total income of Rs.1,56,973/-. Later, notice under Section 148 was issued to the assessee on 16.03.2004. In response to the notice, the assessee filed Return of income on 18.03.2004 admitting a total income of Rs.2,76,000/- which included additional income offered amounting to Rs.1,19,028/- being the loan credits in the name of Shri.Mohamed Hafiz Abdul. The Assessing Officer completed the assessment on 28.03.2005 on a total income of Rs.2,76,000/-. In the course of assessment proceedings, notice under Section 271(1)(c) was issued to the assessee. The assessee filed a reply on 19.09.2005 stating that it has offered a sum of Rs.1,19,028/- and paid the tax and requesting not to levy penalty under Section 271(1)(c). The Assessing Officer rejected the contention and levied a penalty of Rs.41,680/-. Aggrieved by the orders of penalty for both the assessment years, the assessee filed appeals to the Commissioner of Income-tax (Appeals). The C.I.T.(A) dismissed the appeals and confirmed the orders of the Assessing Officer levying penalty under Section 271(1)(c) of the Act. Aggrieved, the assessee filed appeals to the Income-tax Appellate Tribunal ("Tribunal" in short). The Tribunal allowed the appeals filed by the assessee, deleting the penalty. Hence the present tax cases by the Revenue.

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3. Learned Standing Counsel appearing for the Revenue submitted that the assessee himself has disclosed the additional amounts for both the assessment years and also failed to prove the genuineness of the loan credits accounted for. Hence the Assessing Officer is justified in levying penalty under Section 271(1)(c) of the Act.

4. Heard the counsel. The Tribunal followed its earlier order relating to the assessee's own case and held as follows:-

> "4. Aggrieved, the Assessee preferred an appeal before the C.I.T.(Appeals). The C.I.T. (Appeals) confirmed the levy of penalty in both the years. At the outset, the ld. Counsel for the Assessee filed the decision of the I.T.A.T. in Assessee's own case in ITA No.1151/M/2005 dated 3.10.2005 where exactly on identical facts the issue has been considered and decided in paragraphs 12 and 13, which reads as under:
>
> > "12. In the present case, as far as the last years credit balances, commission payment, sundry creditors are concerned, it could not compel the attendance of witnesses since it admitted the income and that would not give right to the Assessing Officer to conclude as a false return inviting imposition of penalty under sec.271(1)(c) of the Act. In the present case, the penalty is levied only on the basis of assessment proceedings but in the scheme of the Act, the proceedings for imposition of penalty though emanating from the proceedings of assessment, are essentially, independent and a separate proceedings which closely follow the assessment proceedings. Findings given in the assessment proceedings are certainly relevant and have probative value, but such findings are material alone and may not justify the imposition of penalty if the concealment is not proved by the Assessing Officer. The fact in the penalty order as narrated above is that the penalty was levied only on the reason that the Assessee has considered a particular item of expenditure, sundry credits as income. The actual position in law in that merely because the Assessee has agreed to the assessment, that cannot automatically bring in levy of penalty. If the Assessee offers an explanation, the revenue authorities have to consider the acceptability of the explanation and pass necessary orders. If the explanation is found

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to be acceptable, notwithstanding addition made by treating the amount offered by the Assessee as income from undisclosed sources, penalty cannot be levied. But if the explanation is found to be vague or fanciful and without any foundation or basis, it is always open to the revenue authorities to impose penalty. It is also a fact that the Assessing Officer while framing the assessment, was not sure that in which year the income will be assessed with regard to opening balance, earlier year expenses and opening balance of sundry creditors and he was not sure in respect of commission payment whether it is income or not. The explanation submitted by the Assessee that declaration made by him to add the income to buy peace with the Department and to come out of vexed litigation, can easily be treated as bona fide in the given facts and circumstances of the present case.

13. There should be a definite finding about the concealment in the penalty order and the penalty must not be levied only on the basis of what is assessed and even the Assessee is assessed at a higher figure than the returned income, then the penalty is not exigible. This view has been supported by the Hon'ble Jurisdictional High Court in the case of CIT V. K.R.Chinni Krishna Chetty [2000] 246 ITR 121 wherein the Hon'ble High Court has dealt with this issue and held that under sec.271(1)(c) of the Act the authority is given the discretion to levy a penalty if there is concealment of particulars of income and even as regards the quantum of the penalty there is a discretion. Of greater importance is the necessity for a definite finding that there is concealment, as without such a finding of concealment, there can be no question of imposing any penalty. It was further held that the mere revision of the income to a higher figure by the assessing authority does not automatically warrant an inference of concealment of the expenditure on the construction. The addition to the income of the Assessee based on the report of the valuer was rightly regarded by the Tribunal as being sufficient for recording a finding of concealment of income. Concealment implies some deliberate act on the part of the Assessee in withholding the true facts from

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the authorities. The fact that the valuer assessed the building at a figure higher than the one reported by the Assessee does not by itself lead to the inference that there had been concealment. Therefore, respectfully following the decision of the Hon'ble Supreme Court and the Hon'ble Jurisdictional High Court cited supra, the penalty for concealment of income is not possible merely on the basis of surrender of income by the Assessee and the Assessing Officer has levied the penalty only on the ground that the Assessee has surrendered the income. However, the Assessing Officer has not brought out any material to prove the concealment of income and penalty on this ground alone cannot be sustained. As regards the admission of the Assessee, it must be clear and conclusive and there should be no doubt and ambiguity of the alleged admission. But in the present case, it is doubtful in which year this income will be assessed. As far as the assessment is concerned, the Assessee has agreed but it contested the penalty and the Assessing Officer could not show that the income in any way is concealed. In the present case in hand, the Assessing Officer having not proved the concealment of income on any basis, therefore, the penalty cannot be sustained only on the basis of admission of income by the Assessee. Accordingly, the penalty is deleted and the orders of the authorities below are quashed."

5. In the present appeals also, the facts are identical and it is not known when these credits were introduced, whether in assessment year 1997-98 and 1998-99 or prior to that. Neither the Assessee nor the Department proves anything about the introduction of these credits. From the above reasoning of the Assessing Officer in the penalty order, we are of the view that the concealment was not proved. Hence, the levy of penalty sustained by the C.I.T.(Appeals) is without any reason. In view of this we have no hesitation in deleting the penalty. Accordingly, the orders of the lower authorities are reversed."

From a reading of the above, it is clear that the Tribunal has given a clear finding that the concealment has not been proved by the authorities below. The question whether there is a concealment or not is a question of fact. The finding given by the Tribunal is that the authorities below, failed to prove the concealment. Hence the order of the Tribunal is not a perverse

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order. In the case of T.Ashok Pai Vs. Commissioner of Income-tax [2007] 292 ITR 11 (SC), the Supreme Court held that the Appellate Tribunal alone was the highest authority empowered to determine the question of fact and the High Court should not ordinarily disturb the finding of fact arrived at, by the Tribunal. In the present case, the finding is that there is no concealment and the same was not proved by the authorities. Hence the Tribunal came to the correct conclusion that these are not fit cases for levying penalty. Learned Standing Counsel appearing for the Revenue is also unable to state whether the Revenue has filed any appeal against the earlier order of the Tribunal, or not. The reasons given by the Tribunal are based on valid materials and evidence and we do not find any error or legal infirmity in the order of the Tribunal so as to warrant interference.

5. Under the circumstances, no substantial question of law arises for consideration of this Court and accordingly, the tax cases are dismissed. Consequently, M.P.No.1 of 2007 in T.C.(A) No.1002 of 2007 is closed. No costs.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Assistant Registrar,
   Income-tax Appellate Tribunal,
Rajaji Bhavan, III Floor, Chennai

2. The Secretary,
   Central Board of Direct Taxes,
   New Delhi.

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3. The Commissioner of Income-tax (Appeals) IX,
   Chennai-600 034.

4. The Income Tax Officer,
   Ward-IX(3), Chennai.

+ one cc to M/s. Pushya Sitaraman, Advocate sr no. 41065

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